

FUNDAMENTALS OF TRIAL ADVOCACY COURSE

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IMPEACHMENT

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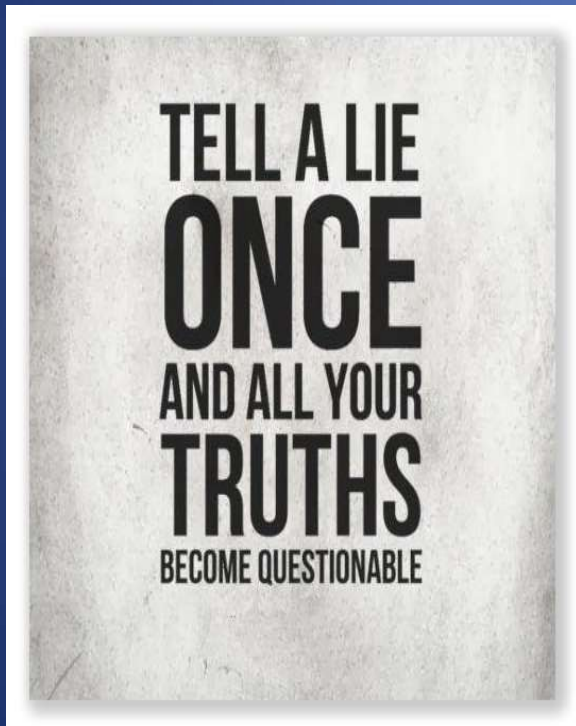
ELIZABETH BURTON ORTIZ
EXECUTIVE DIRECTOR

Impeachment

Tips & Techniques



What is Impeachment?



- Impeachment techniques are designed to discredit the witness and thereby reduce the effectiveness of his or her testimony with the jury
- Essentially you are showing the jury why the witness is full of it

Know Your Rules

- **RULE 608:**
EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS
- **RULE 609:**
IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME
- **RULE 613:**
PRIOR STATEMENTS OF WITNESSES
- **RULE 404(a) & (c) :**
PERTINENT CHARACTER EVIDENCE OF VICTIM OR ACCUSED
- **RULE 405:**
METHODS OF PROVING CHARACTER
- **INFORMATION RELATING TO THE WITNESSES ABILITY TO SEE, HEAR, PERCEIVE THE EVENT**

Know Your Rules

- Rule 607, Arizona Rules of Evidence
 - “The credibility of a witness may be attacked by ANY party, including the party calling the witness.”

Translated: yes, you can impeach your own witness



Different Ways to Impeach

- **Bias**
- **Perception**
- **Experience**
- **Battle of Experts**
- **Prior Felony Convictions**
- **Prior Inconsistent Statement or Lack of Statement**

Bias



- **Examples:**
 - **Friend or family member of the Defendant testifies on their behalf**

You want to show that the witness has a vested interest in seeing the Defendant acquitted

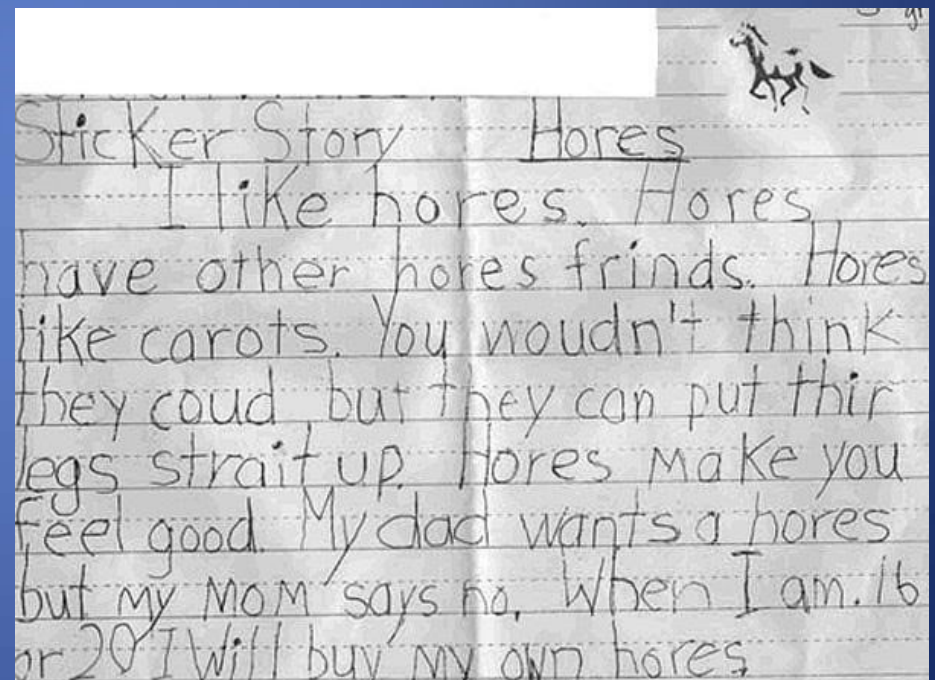
Perception

- **Examples:**

- Witness was not able to view incident well
- Witness' was under the influence of drugs or alcohol

You must show that the witness' testimony is inaccurate because of their ability to see/hear/perceive what actually happened

This witness is usually mistaken, not lying!





Experience

- **Example:**
 - **Witness in a DUI case testifies that Defendant was not acting impaired**

You want to point out that the witness has no training, education, or experience in evaluating impaired drivers



Expert Witness

- **Can usually use nearly all the impeachment techniques**
 - **Bias:** expert makes a living testifying for the Defendant; being paid for testimony
 - **Perception:** expert has NO firsthand knowledge
 - **Experience:** expert has no experience in the field (e.g. FSTs)
 - **Prior Statements:** experts love to hear themselves talk; usually a wealth of prior statements if you look

Prior Felony Convictions

- 609 (a)

General Rule. For the purpose of attacking the credibility of a witness, evidence shall be admitted if elicited from the witness or established by public record, if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect, and if the crimes (1) was punishable by death or imprisonment in excess of one year under the law or (2) involved dishonesty or false statement

Prior Felony Convictions

Limitations:

- 10 years (excluding time spent in custody)
- May be sanitized
- Court still conducts balancing test (may mean you don't get to bring in all of them)

Notice:

- Need to file a 609 motion for the Defendant and any witnesses noticed by the defense that have prior felony convictions

Don't forget dishonesty or false statement – does not need to be a felony, or within the time limits!

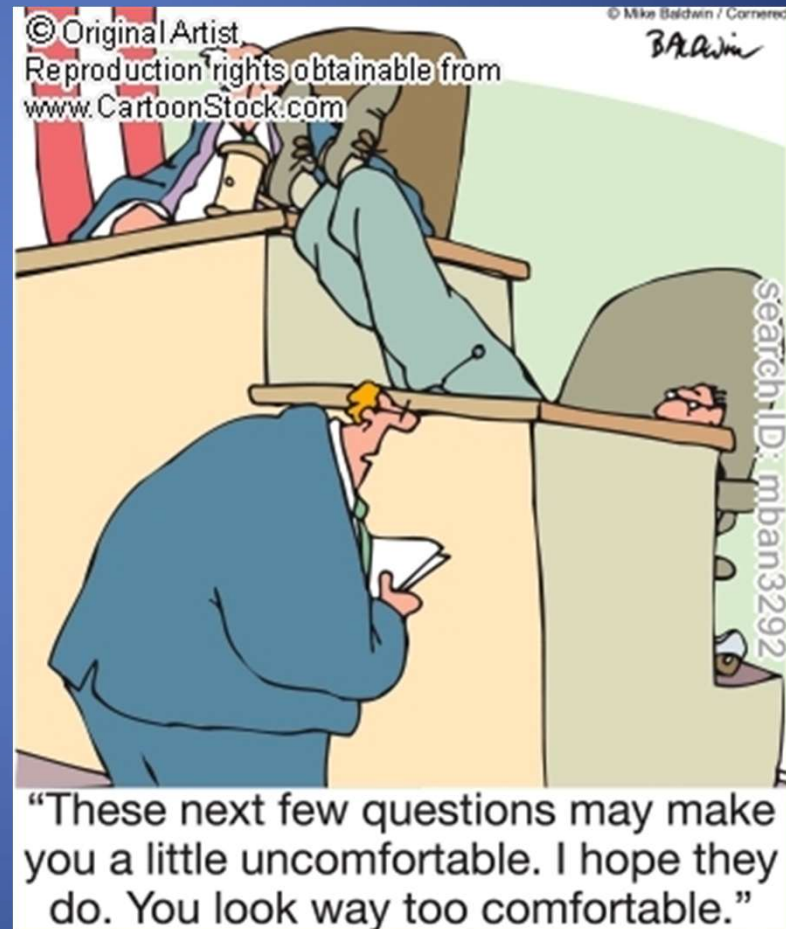
How to Prepare

- Find prior statements by the witness
- Anticipate ways the witness will try and alter their testimony
 - What is the noticed defense
 - Deviation requests
- Create a “cheat sheet”
 - Pull out every single statement that is good for you and make reference points

TRACK THE LANGUAGE EXACTLY

Impeachment by Prior Inconsistent Statement

**Preparation
Preparation
Preparation**



Create an Impeachment Cheat Sheet

- **Find every statement that may help you**
- **You must use EXACT quotations; don't paraphrase**
- **Group by subject**
- **Note reference point**
 - **Page and paragraph in report**
 - **Minute/second in recording**
 - **Page and line reference in transcript**

Impeachment:

Re: shooting that occurred at her house that day

"Yeah, I saw that" (11:55)

"That dude came out of that car and told the officer to back the F

Re: Did she see anybody point a gun at anybody?

"Just the officer and that dude" (15:00)

"The dude like pu

"I saw the dude li
the F up and the c
but I heard a gun.

Re: Did she see h

"yeah" (16:50)

"That dude just p

Streed Impeachment

Circumstances of Retirement

"ultimately I was subjected to a punitive transfer sending me back to patrol" [notice of claim, pg. 1]

"~~As a result of these actions I was forced~~ into an early retirement by the San Diego County Sheriff's

heriff's Captain Stan Embry that I was being transferred 9after
a patrol car" [notice of claim, pg.8]

Detention facility on February 22,1991, and, as a result of the
1991" [notice of claim, pg.9]

members of the San Diego County Sheriff's Office and San Diego
as a 'renegade,' 'out of control,' 'loose cannon,' and 'maverick'
tional distress, and has a negative impact on my professional

ransition to a new career?

uary, 1989, a group of S.D.P.D. administrators met with Sheriff
er,' that my methods of investigation were not
force; and that I was 'difficult' to work with." [notice of claim

Page 6: Ln. 15-21

Re: baby J is the one who did all this

Page 9: Ln. 9-13, 25; Page 19: Ln. 9-14

Re: he shot her up with heroin

Page 11: Ln. 7-12

Re: he will hurt Mom if Mom wakes up

Page 11: Ln. 17-18

Re: he's manhandling her

Page 11: Ln. 22-25

Re: Baby J asks "who's here"

Page 14: Ln 14-17

He backhands her

Page 14: Ln. 23-25

Hits her on left side

Page 15: Ln. 12-14, 18-21

Talks about what they are going to do with she and Vanessa

Page 16: Ln. 2-4, 8-10

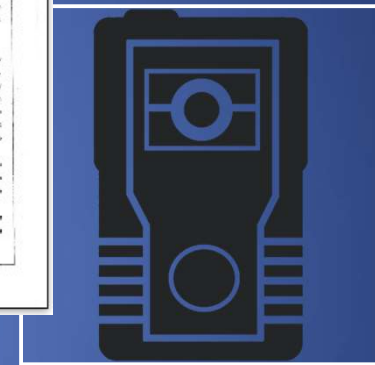
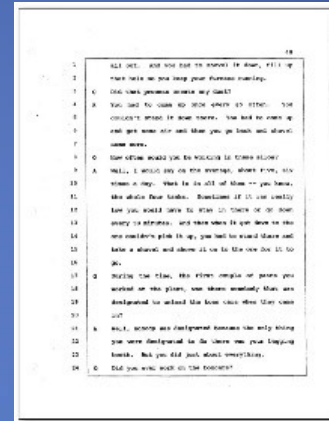
Re: Nicki's involvement "just driving"

Page 17: Ln. 15-20

Re: tying up and taking to the lake

Page 4-5: Ln 25-3

Where to look:



Steps to Impeachment by Prior Inconsistent Statement:

- 1. Identify the Statement**
- 2. Decide whether the witness' statement hurts**
- 3. Lock the witness into the lie**
- 4. Lay Foundation**
- 5. Confront the witness with the exact language of the prior statement**

Step 1 – Identify the Statement

- What is the statement that you want to impeach
 - Does it contradict a prior statement the witness made?
 - Is it completely new information?

Step 2 – Does the statement hurt?

You must decide whether you even want to impeach

- Must be worth the fight!
 - *Example: Defendant tells the arresting officer that he didn't have anything to drink. Then, in your DUI trial testifies on direct exam that he actually had 2 drinks, and only said he didn't have any to the officer because he was "scared"*
- Do you want to impeach the veracity of this new statement?

Making the Decision to Impeach

- 2 requirements:
 - Better be something that's good for me
 - Better be able to win
 - So obviously true that the witness can't deny it
 - I have a prior inconsistent statement that I am ready to impeach witness on



Step 3 – Lock the Witness In

- Restate the specific claim (lie) you want to impeach:

“Just to clarify, is it your testimony that the bruise on your face came from falling down the stairs?”

“So you’re now claiming that you lied to Officer Smith when you told him the Defendant hit you.”

- At this point, the witness will either agree (confirm the inconsistent statement) or “bail”

Step 3 – Lock the Witness In

- When witness bails here, do NOT stop.
- Ask a question that reinforces the earlier testimony was true
- Make them your witness when given that opportunity.
 - *e.g. Q: Did you say that you were alone at your house that night?*
A: well, no
Q: In fact, your child Andrew was also there, wasn't he

Leading Questions

- A note about leading questions:
 - Whenever you ask a leading question, you are essentially vouching for the credibility of the statement. If you ask a leading question and it blows up in your face, you have basically impeached yourself.
 - This is why preparation for impeachment is so important

1 Q So your story now is that you were upset
2 about not being allowed to have drugs and that's why
3 your jumped out of the car?

4 A I was sick to begin with when all this
5 happened. There was no heroin there.

Lock in

→ Q Is that what you're saying, that jumped
7 out of the car because you weren't allowed to have
8 drugs?

Bail

→ A And I wanted to get away.

10 Q You wanted to get away from who?

11 A The whole situation.

12 Q Why?

13 A I was mad. Because I was mad. I was mad
14 about everything that was going on. I was mad because
15 he didn't stick up for me. I was mad because Nicki
16 was doing things to me.

2 Q Okay. And what was the defendant doing?

3 A I don't know. Standing there.

4 Q Okay. When you spoke to police that
5 night, didn't you tell them that he backhanded you?

6 A No. Nicki backhanded me.

7 Q I understand that's what you're saying
8 now. But when you spoke with the police, didn't you
9 tell the police that the defendant backhanded you?

10 A I may have.

11 Q Okay. And that was on the left side of
12 your face?

13 A I don't remember what side it was on.

Step 4 – Lay Foundation

- Ask questions needed to establish the existence and admissibility of the prior statement for impeachment purposes
- Will vary depending on the form of the prior statement
- Give the witness an opportunity to view it

21 Q Was the defendant angry when he got
22 there?

23 A I don't remember.

24 Q Okay. Ashley, at the end of the events
25 that happened this night, you gave an interview to

2 A Yes.

3 Q You spoke with the police?

4 A Uh-huh.

5 Q And during that interview, you told them
6 some things that had occurred, correct?

7 A Correct.

1 MS. DIEDERICH: Your Honor, for the
2 record, I'm showing Ms. Martinez a transcript of her
3 interview with police to help refresh her a
4 recollection.

7 BY MS. DIEDERICH:

8 Q And, Ms. Martinez, does that help refresh
9 your recollection about what you said to police?

10 A I mean, that didn't really say anything.

11 Q Isn't it true that in that transcript you
12 told the police that it was because he was wild?

13 A I really don't even know what that means
14 to be honest with you. I don't even know why I would
15 say that.

16 Q Okay. But that is what you said, right?

17 A I guess so.

Step 5 – Confront With Prior Statement

- Direct the witness to the prior inconsistent statement by using the exact language of that statement
 - Read the transcript statement to the jury yourself
 - Require the witness to read the inconsistent statement to the jury
 - Play the audio / video recording (if deny)
 - May need to call Officer in rebuttal (if deny)

How to Confront:

- Writing (Transcript)
- Audio
- Video
- Deposition
- Police statement
- Witness statement

4 Q You told the police that he told you he
5 was going throw you out of the car?

6 A I don't know. I don't remember.

7 MS. DIEDERICH: Approach, Your Honor?

8 THE COURT: Permission granted.

9 BY MS. DIEDERICH:

10 Q I'm showing you page 29 of your interview
11 with police. Go ahead and take a look at that and let
12 me know when you're done.

13 A Okay.

Use the exact language!

14 Q so, Ashley, that night you told police,
15 "He kept saying they were going throw me out but every
16 time he wanted to throw me out, he kept trying to tie
17 my hands back so that I couldn't run because he said
18 it was going hurt when I fall so he was going make it
19 worth it," correct?

Other Impeachment Techniques



Impeachment by Omission

- Goal is to demonstrate that if what the witness is saying were true, they would have said it before now

Impeachment by Omission

- Statements come in 2 forms
 - Ones that fit into the witness' prior statement
 - You need to establish that if the new statement is true, any reasonable person would have stated it then
 - Ones that do not
 - You need to extrapolate other information that the witness offered without being asked, or that isn't important, and juxtapose this with the importance of the new statement

1 So would you agree with me, Ashley, that
2 this transcript starts out by saying, "Today is March
3 29th at about 3:15 p.m."?

4 A Yes.

5 Q So the first interview that you give
6 where you change your story is March 29th of 2014?

7 A Yes.

8 Q What did you tell the defendant's
9 attorney at that point?

10 A What had happened that night.

11 Q And specifically how did you say was
12 responsible?

13 A For most of it, it was Nicki, yeah.

14 Q And so that's different than what you
15 told the police, correct?

16 A Yes.

17 Q The story about Nicking being
18 responsible?

19 A Yeah.

20 Q Because to the police you had said that
21 Nicki just drove, right?

22 A Well, that's what I told them, I guess.

23 Q So, according to you, Nicki is
24 responsible -- and you're aware that the defendant was
25 arrested, correct?

1 A Yes.

2 Q But you waited until March of 2014 to
3 tell the police who you're saying now is truly
4 responsible?

5 A Well, because I didn't know how to go
6 about doing it. And I was still mad about the
7 situation.

8 Q My question was, you waited until March
9 of 2014 --

10 A Yeah.

11 Q -- this is the very first time that
12 you're saying Nicki is responsible?

13 A Yes.

Caveat – 5th Amendment

- You CANNOT impeach by omission when a Defendant has invoked his/her Miranda rights. This will result in a mistrial, probable dismissal with prejudice, and possible consequences upon you for prosecutorial misconduct.
- Do not ever ask or imply that a DEFENDANT who refused to make a statement to police had a duty to do so

Failure of Recollection

- First determine whether witness is having an honest failure of recollection or is being difficult.
- Ask clarification question
- If honest F.O.R. then refresh, don't impeach



Failure of Recollection

Example:

- *Q: Did you just testify on Direct that the light was green when you crossed into the intersection?*
- *A: I don't remember*
- *Q: You don't remember what color the light was or you don't remember your testimony*

If the witness doesn't remember reality, refresh or short form

If the witness doesn't remember direct, begin impeachment with this question:

“well, regardless of what you said on direct, the fact is that the light was red, wasn't it.”

4 Q You told the police that he told you he
5 was going throw you out of the car?

6 A I don't know. I don't remember.

7 MS. DIEDERICH: Approach, Your Honor?

8 THE COURT: Permission granted.

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16 time he wanted to throw me out, he kept trying to tie
17 my hands back so that I couldn't run because he said
18 it was going hurt when I fall so he was going make it
19 worth it," correct?

The Difficult Witness

- Remember:
 - You are ALWAYS in control
 - You set the tone for each witness' testimony
 - Never answer a witness' question
 - Distinguish between a witness who is trying to be difficult and one who is difficult but doesn't mean to be
 - Only interrupt if what they are saying is prejudicial

Things to Remember

- If you don't follow the steps it is likely that the impeachment will blow up in your face
- Impeachment cannot be scripted, it must become your instinct
- Learn by repetition, trial/error, and exercises. Practice makes perfect!
- Good impeachment cannot be done without good preparation

Things to Remember

- ALWAYS be conscious of whether to take an aggressive or gentle approach to impeachment. This depends largely on the witness. If you are overly aggressive in the opinion of the jury, that might cause them to dislike you more than the lying witness.
- Be conservative with the fire!

Questions?